Tentative Rulings for Tuesday, May 5, 2015 for Department 4, Judge LaPorte, presiding

Bejarano v State of California Case No. 14 C 0338

No objection to judicial notice of the decisions of the Department of Personnel Administration was asserted by plaintiff. The court will take judicial notice of these decisions. (Gov. Code § 19996.2 [Where an employee is AWOL, the Department can reinstate the employee if it accepts the employee's excuse for failing to obtain leave and finds the employee willing to resume the discharge of their duties].)

The court gave plaintiff the opportunity to present supplemental points and authorities on the question whether this discrimination/retaliation lawsuit is barred by plaintiff's failure to set aside the AWOL finding by the Department of Personnel Administration on theories of failure to exhaust administrative remedies/ collateral estoppel. Plaintiff declined the opportunity to further argue her opposition to this position.

The court finds that the demurrer has merit. The demurrer is sustained without leave to amend. Plaintiff's failure to seek judicial review of the administrative decision that she constructively resigned her position with CDCR estops plaintiff from arguing that she was subjected to disability discrimination and retaliation. (*Johnson v City of Loma Linda* (2000) 24 Cal.4th 61, 76 [We conclude that when, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA.] In addition, no FEHA claim can be brought because there was no adverse action. *Coleman v Dept of Personnel Administration* (1991) 52 Cal.3d 1102 at 1120 [Unlike a disciplinary discharge, resignation from state employment does not seriously damage an employee's standing and associations in the community, nor does it foreclose other employment opportunities]; *Yanowitz v L'Oreal USA Inc* (2005) 36 Cal.4th 1028, 1050 fn 8 [An adverse action is one that is likely to deter employees from engaging in protected activity].) Not only is the discrimination claim barred, but plaintiff cannot establish a prima facie case of retaliation because she has not alleged a protected activity. A request for medical leave is not a protected activity under FEHA. (*Rope v Auto-Chlor System of Washington Inc* (2013) 220 Cal.App.4th 635, 652-653.)

Price v CDCR et. al. Case No. 15C 0013

The court grants the defendants' request to take judicial notice of the February 4, 2014, decision from the California Department of Human Resources. This decision notified plaintiff that his failure to appear at the hearing on January 16, 2014, was found by the administrative law judge to be a withdrawal of his request for reinstatement after automatic resignation, effective November 19, 2013. (Gov. Code § 19996.2 [Where an employee is AWOL, the Department can reinstate the employee if it accepts the employee's excuse for failing to obtain leave and finds the employee willing to resume the discharge of their duties].)

Defendants assert that this decision resulted in a finding that plaintiff constructively resigned his position with CDCR, that a resignation is not an adverse action, and hence

there is no basis for this lawsuit brought under the FEHA. (*Coleman v Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1115.) The court finds that unlike the 14C0338 case, plaintiff did not pursue his objection to the automatic resignation determination by his employer through an evidentiary hearing and decision by the hearing officer. The FAC at ¶¶17-18 alleged that plaintiff was extremely ill on the day of the hearing, he could not appear and his appeal was summarily dismissed without making any accommodation for his temporary disability. Under these circumstances, plaintiff has alleged adequate facts to support his claim that collateral estoppel/ issue preclusion should not be applied, since there was never a final decision on the merits with regard to plaintiff's alleged unexcused absences from work. (*Castillo v City of Los Angeles* (2001) 92 Cal.App.4th 477, 482 [issue preclusion results when an issue is actually litigated, it is submitted for determination and is determined].)

Moreover, because an employee may either pursue an employer's internal grievance process, or a lawsuit under the FEHA, the plaintiff has adequately alleged facts to support his claim that because his FEHA claims were filed first, they should be allowed to continue through this lawsuit, despite the abandonment of his initial appeal of the automatic resignation claim made by his employer. (*Shifando v City of Los Angeles* (2003) 21 Cal.4th 1074, 1092.) Hence, the court overrules the demurrer based on collateral estoppel and failure to exhaust administrative remedies.

However, the court sustains the demurrer by the individual defendants to the FAC on the grounds that the complaint only alleged management decisions made as part of job duties. Although the FAC labeled the actions as "harassment, discrimination and retaliation" the actions described in the FAC with regard to the individual defendants were actions inherently necessary to performance of a supervisor's job. (*Reno v Baird* (1998) 18 Cal.4th 640; *Janken v GM Hughes Electronics* (1996) 46 Cal.App.4th 55.)

The demurrer is also sustained on the grounds that the FAC did not allege sufficient facts to find a disability under the FEHA. It was only alleged that plaintiff suffered a "mental disability" and a "medical condition." (*Bagatti v Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 354 [[T]he touchstone of a qualifying handicap or disability is an actual or perceived physiological disorder which affects a major body system and limits the individual's ability to participate in one or more major life activities.].)

The demurrer to the second cause of action for retaliation is sustained on the grounds that filing of a grievance over whether FMLA time should be approved or not is not a protected activity under FEHA and so not a basis for a retaliation claim. (*Villanueva v City of Colton* (2008) 160 Cal.App.4th 1188, 1198-1199 [there is no protected activity unless the substance of the grievance is related to FEHA];*Rope v Auto-Chlor System of Washington Inc* (2013) 220 Cal.App.4th 635, 652-653.) The federal FMLA (Family Medical Leave Act) and state CFRA (California Family Rights Act) have a different standard than disability under section 12926. The 12-week FMLA and CFRA leave is available for an employee's "serious health condition that makes the employee unable to perform the functions of the position of such employee." (29 U.S.C. § 2612(a)(1)(D); § 12945.2, subd. (c)(3)(C).) Disability under section 12926 means (1) a physical disease,

disorder, or condition that affects a specified body system (neurological, immunological, etc.) and limits a major life activity, or (2) a mental disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. (§ 12926, subds. (i), (k).)

Plaintiff is given leave to file a Second Amended Complaint that is due 15 days after service of notice of ruling.

There are no other tentative rulings. Consistent with California Rule of Court, rule 3.1308 (a)(2), no notice of intent to appear is required. If the non-prevailing party does not appear for hearing, the tentative ruling will become the order of the court. The prevailing party shall prepare an order for the court's signature.